No. 06-207

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In The
Supreme Court of the United States

ALFONZO INGRAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

The government's response is based upon a compilation of case law and statutes regarding witness compensation and fails to address payment specifically contingent upon criminal forfeiture. The Petitioner has no quarrel with the well settled practice of making contingent fee arrangements with informers. Courts have long held that the government may offer leniency, money, or as in this case, citizenship. When, as here, the reward is based upon the conviction of a defendant, it is tantamount to purchasing testimony and is a violation of due process.

The Petition points exclusively to a deal brokered by the government in which the liberty of an individual is placed at stake with a prize attached to it in the form of a success based contingency fee. In short, Diaz was promised 20% of money seized in reverse sting drug operations instigated by him. Diaz' payment would come directly from the seizure and forfeiture of the money, as outlined in the indictment. This record reflects that the government made a choice to include the forfeiture within the criminal proceedings. If a civil forfeiture had been instituted, and Diaz testified with the hope of a reward in a proceeding which did not involve liberty, but only the possession of money, there would be no constitutional violation. Diaz's reward required a criminal conviction in order to obtain the forfeiture, and thus the integrity of key evidence used to convict the petitioner was tainted beyond redemption by cross examination or instruction. *See*, 21 U.S.C. §853; *United States v. Sandini*, 816 F.2d 869, 873 (3rd Cir. 1987). *See, United States v. Palow*, 777 F.2d 52, 54 (1st Cir. 1985) ("The record shows that the convictions had nothing to do with the contingent agreement at issue. Accordingly, we see no reason here to exclude on due process grounds the informant's testimony").

The petitioner does not argue that his due process rights were violated by an agreement contingent upon the truth but rather contingent upon a verdict of guilty, a necessary prerequisite to Diaz's recovery of money. As noted in *United States v. Dailey*, 759 F.2d 192, 201 (1st Cir. 1985), "we note that at present we can think of no instance in which the government would be justified in making a promised benefit contingent upon the

return of an indictment or a guilty verdict." Much of the authority cited by the government deals with compensation related to the "overall quality of cases," not a verdict of guilty and thus, does not directly address the issue raised by Petitioner.

The government's reply rests on the long-accepted statements from *United States v. Hoffa*, 385 U.S. 293 (1966), which states the principle that no matter what agreement is made with an informant, a jury, informed of the circumstances and motivations, can properly weigh such evidence when measuring credibility. It has been more than forty years since that decision. It no longer shocks the conscience of any jury that an individual may be rewarded with liberty, citizenship, preferential treatment or any incentive for the purpose of procuring their testimony regarding knowledge of a criminal act. Prospective jurors are routinely inundated with the popular culture which has glamorized the practice of criminal law and which routinely displays in motion pictures and television series the ease with which prosecutors make deals for testimony. Thus, the effect of cross examination has been muted since that time. While cross examination may expose the motivation behind an informant's testimony, it does not provide an adequate due process safeguard against the purchase of testimony, and ultimately, against the corruption of the truth seeking process. Certainly the government would move *in limine* if it were to discover that an alibi witness had been promised a fee to provide exculpatory testimony to be paid only if a defendant were acquitted, even though the alibi witness provided truthful information.

A close examination of the cases cited by the government reveals more language condemning outcome based rewards than approving such methods. The government cites *United States v. Persico*, 832 F.2d 705 (2nd Cir. 1987), for the proposition that such agreements are properly placed before the jury. However, a reading of *Persico* reveals that the "'overall quality' of cases that were developed [] did not depend on the outcome of any prosecution." *Persico*, 832 F.2d at 717. Further, the arguments of cases cited by the government in *United States v. Fallon*,776 F.2d 727 (7th Cir. 1985), and *United States v. Valle-Ferrer*, 739 F.2d 545 (11th Cir. 1984) are unpersuasive. In *Fallon*, the informant stood

to receive leniency, a practice compatible with precedent. In *Valle-Ferrer*, the informant was promised, days before the trial was set to begin, $1,000 if the defendant was convicted. This scenario is distinguishable in several respects. As the Eleventh Circuit noted, the informant had already completed his investigative work before his learning of the fee. Here, Diaz was always working towards 20% from the beginning of his efforts setting up reverse-sting drug transactions where defendants would bring money instead of drugs. As a result, Diaz was motivated to create the case and enrich himself through a conviction. Further, there is a large difference between the $1,000 offered in *Valle-Ferrer*, and the $53,000 Diaz stood to gain here, in addition to the $113,000 he received as a salary, his citizenship, immunity, and other benefits.

The government's reliance on *United States v. Cresta*, 825 F.2d 538 (1st Cir. 1987), is misplaced. In *Cresta*, while the informant stood to receive a portion of the seized property once sold, it does not appear the property was forfeited criminally. A civil forfeiture proceeding is unrelated to a defendant's liberty. Here, there was a criminal forfeiture. A criminal forfeiture requires a conviction, making Diaz's fee contingent upon a conviction, not merely his "truthful testimony." This form of payment vests the witness in the outcome of the criminal proceeding.

In *United States v. Gonzales*, 927 F.2d 139 (3rd Cir. 1991) cited by the government, the opinion does not indicate the forfeiture proceeds, which were to go to the informant, were gained as a result of a criminal forfeiture. The informant, Vollmer, specifically stated that his "reward was not dependent on the defendant's conviction." *Gonzales*, 927 F.2d at 143. But he could not be paid unless there was a forfeiture which created a fund. Such a rule would not necessarily violate due process rights of a criminal defendant as the forfeiture proceeding would be conducted in a different forum, and therefore, the case does not provide the support urged by the government.

Most importantly, the government ignores the Seventh Circuit's concern as voiced in *United States v. Estrada*, 256 F.3d 466 (7th Cir. 2001), and echoed by the district court in this case.

Pet. 11. While the conviction was affirmed in *Estrada*, the Court discussed the contingency arrangement with the informant and noted that it had "unease" about the arrangement. Again, as with *Gonzales*, the opinion is unclear whether the forfeiture proceedings was civil or part of the underlying case. In discussing cases regarding payments of this nature, the Seventh Circuit specifically quoted from other circuit opinions which have contingent agreements based upon the conviction of particular persons and noted that in those cases, the bulk of payments made to informants were made before trial and were therefore not outcome determinative.

As pointed out in Petitioner's Writ of Certiorari, the district court struggled with this due to the lack of clear authority directing her regarding the admissibility of such evidence. Likewise, Judge Williams dissented, finding the practice analogous to purchasing testimony. The purchase of testimony, by either party in a litigation, is abhorrent and has never been condoned. This case provides the court the opportunity to create a bright line test regarding the admissibility of testimony motivated by a success based fee contingent upon a criminal conviction. The rule which Petitioner proposes does nothing to bar the government from instituting civil forfeiture proceedings which would allow them to seize assets using contingency rewarded witnesses without the risk of the loss of liberty based on perjured testimony, or to continue the long-standing practice of expending benefits such as leniency, cash, or even citizenship. But in basing the informant's 20% on the successful outcome of a criminal forfeiture, which in turn requires a finding of guilt to the underlying crime, the effect is to make payment dependent on the outcome of a criminal proceeding, or paying a witness for his testimony, a practice counter to our system of due process.

While the government handpicked a quote from Judge Williams' dissent finding that petitioner's argument "have long since been ignored if not abrogated or outright overruled," the next sentence, following a series of citations, states that, "[T]he specter of these values persists nonetheless." Pet. App. 15. Later, Judge Williams cautions the government to also "consider the canons of professional conduct, which forbid the

practice of predicating witness payment on case outcomes" and concludes that "any percentage of moneys paid to a witness [are] improper when such payment depends upon the conviction of another." Pet. App. 17-18.

The government treats this issue as if it were governed by well settled law. However, the government does not address the Seventh Circuit's discussion in *Estrada*, the issues raised in Judge Williams' dissent, or the language of the district court indicating that "I think the government has taken quite a risk . . . if the only way to get you to stop doing it is to throw one out, that they are going to throw one out." Pet. 11. It is apparent that this issue is not settled and there is significant support in the law for barring informant testimony in a criminal case, when the informant's reward depends on the outcome of a criminal forfeiture founded upon a verdict of guilty. The Petitioner was denied due process at his trial and this issue is ripe for review.

Respectfully submitted,

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